



NUCLEAR ENERGY INSTITUTE

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Mr. Kenneth Wade
Project Manager
Office of Nuclear Energy (NE-30)
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

**SUBJECT: Standby Support for Certain Advanced Nuclear Facilities (70
Fed. Reg. 71107, November 25, 2005)**

Dear Mr. Wade:

On behalf of the U.S. nuclear energy industry, the Nuclear Energy Institute¹ and NEI's New Plant Oversight Committee (NPOC)² appreciate the opportunity to provide comments on the Notice of Inquiry (NOI) published by the Department of Energy (70 *Fed. Reg.*, 71107, November 25, 2005). This NOI enumerates some of the issues and questions associated with implementing Section 638 of the Energy Policy Act of 2005, and solicits public input on those issues.

Section 638 of the Energy Policy Act provides "Standby Support for Certain Nuclear Plant Delays." This section authorizes the Secretary of Energy to provide risk insurance that would cover certain costs in the event that licensing or litigation delay commercial operation of a nuclear power plant. The coverage is capped at \$500 million for the first two reactors starting on the first day of delay, and at \$250 million for the next four reactors after the first six months of delay.

Covered delays include (1) Nuclear Regulatory Commission (NRC) failure to meet schedules for review and approval of inspections, tests, analyses and acceptance criteria (ITAAC); (2) any delay caused by the conduct of pre-operational hearings; and (3)

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

² NEI's New Plant Oversight Committee (NPOC) consists of the chief executives or chief nuclear officers of the companies that have announced plans to develop applications for construction/operating licenses (COLs) for new nuclear power plants. NPOC provides a mechanism to establish industrywide consensus on regulatory, financial and other significant policy issues associated with new nuclear plant development.

litigation. Covered costs include debt service and other costs that result from a delay in commercial operation, in addition to any incremental costs incurred by the project developer if the developer must purchase power to meet an electricity supply obligation that would otherwise have been met by the new nuclear plant.

The statutory language in Section 638 of the Energy Policy Act affords the Department of Energy considerable flexibility in developing the regulations to implement this risk insurance. That flexibility includes such issues as pricing of the risk insurance, the allocation of costs between the project sponsor and appropriations, and the delay costs covered by the Standby Support Program Account. The industry commends the Department of Energy for recognizing this flexibility in its Notice of Inquiry. Incorporating this flexibility into implementing regulations will assist in achieving the legislative intent, which is to protect private companies and private investment against delays over which they have no control.

NEI believes that a measured evaluation of the risks associated with the licensing process is essential, in order to determine the risk factors associated with the Standby Support coverage, which will govern the “scoring” of this program under the Federal Credit Reform Act. If implemented appropriately and managed efficiently by industry and the NRC, the licensing process (including that period toward the end of construction as the dates for fuel load and commercial operation approach) should be straightforward. The Standby Support is designed to deal with extremely low-probability events and the budget “scoring” of this program should reflect that reality. (Although they are low-probability, however, delays in commercial operation carry extremely high consequences, which explains why industry needs this risk insurance for the first few plants that navigate the NRC’s licensing process.)

Since Section 638 of the Energy Policy Act concerns issues outside the Department of Energy’s traditional scope and experience, NEI encourages DOE to consider retaining outside counsel with appropriate expertise in insurance matters to assist in drafting the implementing regulations, to draft the insurance contracts, and to design the claims management process. These areas of expertise are well-established in the commercial sector and within the federal government, and DOE may find it useful to tap this expertise as it moves forward with implementation of Section 638.

In addition, the interim final regulations for Section 638, scheduled to be published in May 2006, should include specimen contracts for the insurance coverage. The insurance contracts should be available for review and comment in addition to the regulations themselves.

NEI’s comments are divided into three sections:

- I. The first section provides the nuclear energy industry’s general perspective on the intent and purpose of the risk insurance provided by Section 638 of the 2005 Energy Policy Act, and the principles that should govern its implementation.

Understanding the nature of the risks being covered, and the regulatory process, is essential to structuring the insurance program authorized and required by the Energy Policy Act to meet the nuclear energy industry's legitimate needs.

- II. The second section provides the industry's position on the major issues that must be addressed in implementing regulations to ensure that the risk insurance is workable from an industry perspective.
- III. The third section provides answers to the specific questions posed by DOE in its November 25, 2005, NOI.

If you have questions about these comments, I can be reached via telephone at 202.739.8021 or via e-mail at rjm@nei.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard J. Murray". The signature is written in a cursive style with a large, prominent initial "R".

I.
INTENT AND PURPOSE
OF THE RISK INSURANCE

The risk insurance (or Standby Support) provided by Section 638 of the 2005 Energy Policy Act has a straightforward, simple purpose. The risk insurance is designed to protect private companies against delays in commercial operation of completed nuclear power plants resulting from the licensing process or litigation. A company that experienced a delay in commercial operation of a completed nuclear power plant would experience significant financial losses. The insurance provided by Section 638 of the Energy Policy Act of 2005 is designed to limit the financial impact on companies when those losses result from regulatory or litigation delays.

The insurance protection and insurance policies should, therefore, be as straightforward as the legislative intent and purpose.

The procedures leading to NRC authorization for commercial operation of a completed nuclear plant are similarly straightforward. The process is spelled out in Section 103 of Part 52 of NRC's regulations and, in relevant part, §103 provides that:

1. Not less than 180 days before it expects to load fuel, the licensee will inform the NRC of its intent to load fuel, and the NRC will publish a notice to that effect in the *Federal Register*.
2. Publication of the *Federal Register* notice provides "any person whose interest may be affected by operation of the plant" 60 days to request the NRC to hold a hearing on "whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license."
3. Any request for hearing shall show, *prima facie*, that (1) one or more of the acceptance criteria in the combined license have not been, or will not be, met; and (2) the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.
4. After receiving a request for a hearing, the NRC "expeditiously" shall either deny or grant the request. If it grants the request for a hearing, the NRC has the authority to allow full-power operation of the plant if it determines that there is "reasonable assurance of adequate protection of the public health and safety" during that period of interim operation.

To appreciate fully the relative simplicity of this pre-operational phase, it is essential to understand the concept of Inspections, Tests, Analyses and Acceptance Criteria (ITAAC). The ITAAC are not vague, qualitative, general standards susceptible to varying interpretations. The ITAAC are precise, quantitative and unambiguous criteria that are spelled out in the construction and operating license and incorporated into the Construction and Operating License (COL). For example, the ITAAC include such items as:

1. Verification that the control rod drives, and the associated hydraulic and fine motion control subsystems, function as designed. This verification is obtained through tests to demonstrate that each control rod moves up and down over its entire range at a specified speed in a specified period of time.
2. Verification that the ASME Code components in the Reactor Pressure Vessel System retain their pressure boundary integrity under the pressures that will be experienced during commercial operation. This verification is obtained through a hydrostatic test of these components that conforms to the ASME Code, Section III.
3. Verification that control valves with an active safety-related function close in a specified time under system pressure, fluid flow and temperature conditions. This verification is obtained by testing the valves under operational conditions.

These are just a few examples of the ITAAC that will be conducted by the licensee throughout the construction process, and reviewed and approved by the NRC. Although there are thousands of these ITAAC, and although they validate the correct functioning of a complex set of systems and components, they are precise, quantitative indicators that provide direct, unambiguous and unequivocal proof that the plant will operate safely as designed, in accordance with its license. The acceptance criteria are either met, or they are not met. It is difficult to imagine a situation in which a licensee would submit an ITAAC to the NRC for approval that does not meet the quantitative acceptance criteria. Because the acceptance criteria are quantitative, NRC approval of the ITAAC should be straightforward and expeditious.

The nuclear industry believes, therefore, that the nature of the ITAAC process creates a presumption that delays in commercial operation of a nuclear power plant are unlikely to result from the ITAAC themselves. Any such delays, if they were to occur, are more likely to result from:

1. the failure of the NRC to review and approve ITAAC in a timely manner;
2. the failure of the NRC licensing boards to consider contentions and requests for hearings, conduct proceedings and reach decisions in a timely and efficient manner;
3. the NRC's failure to provide guidance to its licensing boards and direct licensing boards to adhere to a disciplined schedule and reach decisions in an efficient and timely manner;
4. the NRC's failure to evaluate and disposition licensing board recommendations in a timely and efficient manner; or
5. the NRC's failure to exercise its discretion to permit full-power operation of a completed plant while a hearing on a contention is pending, despite a clear indication that the plant, as built, would meet the "reasonable assurance" standard.

The nuclear industry believes that the design and implementation of the political risk insurance provided by Section 638 of the Energy Policy Act must, therefore, be governed by the three broad principles discussed above:

First, the legislative intent is straightforward.

Second, the regulatory process in the six-month period prior to fuel load is straightforward, if implemented efficiently by the NRC.

Third, the ITAAC are quantitative, easily verified criteria that allow for straightforward review and approval by the NRC.

Given these three principles, the regulations implementing Section 638 of the Energy Policy Act of 2005 should be similarly straightforward, simple and uncomplicated. An insurance program that does not meet these criteria is unlikely to provide investors the confidence necessary to move forward with investments in, and construction of, new nuclear power plants.

II. NUCLEAR ENERGY INDUSTRY POSITIONS ON MAJOR IMPLEMENTATION ISSUES

The primary objective of Section 638 is to facilitate investment in, and construction and operation of, advanced nuclear facilities by reducing the regulatory uncertainty (including litigation) that could delay commercial operation of a new nuclear power plant. To best achieve this objective, Section 638 should be implemented through well-defined regulations that are equitable to project sponsors and investors, and which do not unduly discriminate in favor of or against any particular advanced reactor design.

A. Eligibility for, and Effectiveness of, Coverage

Section 638 coverage is limited to a total of six reactors, with the first two reactors receiving 100 percent coverage for the covered costs of delay (but not more than \$500 million per contract), and the next four reactors receiving 50 percent coverage (but not more than \$250 million per contract, and only costs incurred after the first 180 days of delay). One of the major issues to be resolved during implementation will be:

1. Determining eligibility for the coverage (specifically, how to determine which plants receive the first two \$500-million insurance contracts, and which will receive the second four \$250-million contracts).
2. Establishing a process that will balance the timing of corporate decision-making with the timing for effectiveness of the coverage established in the statute.

Since the availability and coverage scope of the Section 638 contracts are limited, appropriate sponsor eligibility and queue allocation are critical. Contract eligibility and the queuing process should (1) promote the statutory objective of achieving timely commercial operation of new nuclear power plants, and (2) eliminate situations where contracts and coverage are misallocated to projects that either do not proceed or, once started, are suspended for reasons other than Section 638 covered delays.

The implementing regulations must, therefore, provide objective criteria to (1) determine project status in the queue; (2) determine sponsor eligibility to enter into a contract; (3) establish a mechanism for a project to enter, or advance in, the queue if a higher-queued project does not proceed; and (4) provide rollover in coverage from the 50 percent to 100 percent level, to the extent initial projects are not delayed and thus do not trigger the coverage.

A.1. Queue Status Should be Determined as of the Date of COL Receipt and Commencement of Construction (e.g., Pouring of Safety-Related Concrete)

The statute authorizes the Secretary of Energy to provide coverage to a project when it (1) receives a combined construction and operating license (COL) and (2) commences construction. The industry believes it is essential to define “commencement of

construction” in a clear and unambiguous way, so that coverage is provided to those projects that (1) have made an irrevocable decision to proceed with construction, and (2) will most need the coverage (because they will be the first ones to navigate the new licensing process). For this reason, the industry believes that “commencement of construction” should be defined as pouring of safety-related concrete. Coupled with receipt of the COL, pouring of safety-related concrete would represent a firm commitment to plant construction. Given the degree of organization and commitment that sponsors would undertake to reach the point at which they pour safety-related concrete—including early site preparation and ordering of long-lead equipment—this approach would further the intent of the legislation by ensuring that only “real” projects with a high likelihood of achieving commercial operation receive one of the six queue positions.

A.2. Contract Eligibility and the “Pool” Should be Determined at the Time of Submitting a Sufficient Application for COL

The second major issue is timing. Contract effectiveness and level of coverage for the contract between the Department of Energy and a project developer cannot be determined until the project receives its COL and commences construction. (At that time, the “insurance fee” necessary to support the coverage—obtained either from the project developer or through appropriations or a combination of the two—must be in place.) Long before COL receipt and start of construction, however, the project developer will be seeking project approval from its board of directors and arranging construction financing. Decisions by corporate boards and lenders will obviously depend on whether or not the project in question will receive one of the six Standby Support contracts. To address this timing issue, the industry believes that the Department of Energy should establish a “pool” of companies eligible for the Standby Support. The “pool” would be converted into a firm queue as companies reach the trigger points for effectiveness of the Standby Support (receipt of the COL and commencement of construction).³

In fact, to provide additional certainty to both project sponsors and the Department of Energy, the initial “pool” of eligible reactors that have docketed a COL with the NRC could next be converted into a “conditional queue” when each of those reactors receives its NRC Safety Evaluation Report (SER), which indicates NRC staff approval of the COL. The

³ DOE clearly recognizes the need for such a “conditional” pool. Its Notice of Inquiry states: “The Department believes that the objectives of section 638 are best achieved by maximizing the opportunities for sponsors to enter into standby support contracts as early as practical. The Department recognizes, however, that entering into a contract with a sponsor before the sponsor receives a COL and commences construction may raise a number of implementation issues. These issues arise from, among other things, the requirement to have adequate funding in the accounts before entering into a contract, the different treatment of the initial two facilities and the subsequent four facilities, and the disposition of funds received from a sponsor. The Department’s initial view is that these considerations can be addressed best by the Department being willing to enter into binding agreements with sponsors that submit COL applications to the Commission, at any time on or after such an application is submitted. These agreements between the Department and project sponsors would not themselves be standby support contracts, but would commit the Department to enter into standby support contracts under section 638 with the sponsors of the first six reactors for which a COL is granted and construction commenced.”

“conditional queue” could then be converted into a “firm” queue as project sponsors reach the trigger points for effectiveness of the coverage (*i.e.*, receipt of the COL and start of construction).

In order to document the “pool” and “conditional queue” of reactors eligible for coverage, the industry agrees with DOE’s proposal to enter into binding contracts that obligate DOE to enter into the Standby Support agreement (with either \$500 million or \$250 million coverage, as appropriate) upon qualification by the project sponsor, *i.e.*, once the project sponsor meets the two criteria specified in the statute (COL receipt and commencement of construction). The DOE agreement should provide a schedule indicating the conditional queue, and DOE should issue schedules to contract-holders from time to time to reflect any revisions to the conditional queue.

Under Section 638(a)(4), only persons who have “applied for or been granted a combined license” are eligible to enter into a Section 638 contract. The definition of “applied for” should require that a sponsor has submitted a COL application that the NRC accepts as sufficient for docketing, rather than an application submitted but subsequently deemed insufficient for review by the NRC. This approach would eliminate companies that file a COL simply to hold a place in line, and allocate eligibility for standby support protection to those sponsors and projects that will likely be the first movers and thus need the coverage the most.

A.3. Queue Positions Should Roll to Lower or Non-Queued Sponsors Upon Failure to Proceed

Either a failure to satisfy the conditions to effectiveness of a contract within a specified time period⁴, or abandonment or suspension of construction for an extended period (*e.g.*, 180 days) for reasons other than a covered delay or a *force majeure*, should result in loss of coverage (termination of the contract). This approach would:

1. advance the statutory intent by enabling a lower-queued, or non-queued, sponsor the opportunity to obtain coverage and advance in the queue, or assume the newly open position in the queue, and
2. preserve the legislative intent of providing coverage for six reactors.

A.4. Unutilized Higher Queue Coverage Should Roll to Lower-Queued Sponsors

The statutory language in Section 638 contemplates coverage for the first six nuclear reactors built. It is conceivable that the first two projects covered under 638(d)(2) will reach full power and commercial operation without incurring delay costs (thereby not utilizing the funds to cover such delay costs). If so, the next project(s) in the queue should

⁴ Failure to satisfy the conditions for effectiveness of a contract might include a sponsor receiving a COL but failing to commence construction.

be eligible for the full coverage levels⁵ under 638(d)(2), upon payment of any additional insurance premium established for the full coverage. This rollover in coverage level would continue, for example, through to the fifth and sixth project, if projects three and four also failed to utilize the full coverage that had been “rolled” to them under 638(d)(2).

Rollover in coverage would not, however, extend beyond the first six units to reach commercial operation.

B. Appropriate Pricing of the Insurance Policies Is Critical to Success of the Standby Support Program

The key to effectiveness of the Standby Support Program Account (which covers debt service and other unspecified costs) is the “pricing” of the insurance contracts, the budget “scoring” of those contracts, and the appropriations (and/or sponsor funding) necessary to allow the Secretary of Energy to execute contracts for coverage. If the insurance premium is set unreasonably or unrealistically high, project sponsors will not use the Standby Support coverage, and the implementing regulations will not have satisfied the statutory intent of Section 638.

The nuclear industry believes the Standby Support coverage should be priced similarly to other insurance against sovereign risks provided by other federal government agencies (*e.g.*, the Overseas Private Investment Corp. [OPIC]) and other public and private insurers. An analogous insurance program is OPIC risk insurance against so-called “creeping expropriation,” which covers unlawful government action that deprives investors of property rights, but falls short of outright expropriation. This OPIC insurance carries an annual premium of 40-70 basis points of the face value of the coverage. Similar political risk insurance available from the commercial insurance market typically carries a slightly higher annual premium, in the range of 100 basis points of the face value of the coverage. Using 100 basis points as an example, a \$500-million Standby Support policy would cost the project sponsor \$5 million per year. Assuming a five-year construction period during which the coverage would be in force, the cost of a \$500-million Standby Support contract would, therefore, be \$25 million.⁶ The cost of the second four \$250-million Standby Support contracts would, of course, be significantly less than the nominal \$25 million premium established above for the \$500-million coverage.⁷

⁵ Full coverage would be \$500 million, coverage for delay costs without a waiting period, and coverage for 100 percent of delay costs.

⁶ Under the statute, the entire “cost” of the Standby Support contract must be funded before the contract can be effective. Given this requirement, the industry would be prepared to waive standard insurance practice of an annual premium and prepay the entire cost of the insurance. Under this approach, the insurance contract could assume a five-year construction period as the norm, but could provide flexibility for monthly or annual extensions of the coverage period (and payment of the appropriate additional premium amount) or a reduction in the period of coverage (and a rebate of the appropriate premium amount), at the request of the insured.

⁷ The \$250-million coverage available for the second, third, fourth and fifth reactors is significantly less valuable than the \$500-million coverage available for the first two reactors covered, because the third, fourth, fifth and sixth contracts require a six-month period before delay costs are covered, and

C. Procedures to Determine Appropriations Should Allow for Multi-Year Funding, Backed By the Full Faith and Credit of the United States

To the extent that appropriations are required, any appropriations that support contracts executed under Section 638 must be “multi-year” money. That is, such funds should be available for obligation without time limitation. This is necessary to provide a multi-year period for entering into the contracts and obligating the funds initially, but also to maintain the availability of such funds for replacement contracts in the event any of the initial six contracts is terminated and the funds for such contract are de-obligated.

Whatever the scoring (and the appropriations necessary to support an insurance contract), the Standby Support Program Account will never contain the entire \$500 million per project necessary to make full payment on claims under the first two contracts, or the \$250 million per project necessary to make full payment of claims under contracts three through six.⁸

The statutory language is not clear what happens if the Secretary must make full payment of claims under one of the six contracts. The Section 638 implementing regulations must clarify that claims under the Standby Support program will be handled under Federal Credit Reform Act procedures—*i.e.*, permanent indefinite budget authority exists to pay any claims, without any need for additional appropriation. The regulations should clarify, or the Department should obtain an Attorney General opinion, that the obligations under Section 638 contracts are “full faith and credit” obligations of the United States.

D. Contract Coverage Should Be Clearly Defined To Facilitate Financing

The implementing regulations and the contract terms and conditions must provide certainty and clarify key aspects of contract coverage in order to meet the requirements of lenders and investors (*i.e.*, to be “bankable”). In addition, while Section 638 authorizes the Secretary to enter into such contracts with sponsors, the regulations and contracts must permit assignment of the contracts to project lenders in support of financing for the new plants. The Assignment of Claims Act of 1940, as amended, authorizes the assignment of rights to be paid amounts due or to become due under contracts with the government of the United States, provided that certain enumerated circumstances are met. Thus, the regulations should contemplate that such assignments will be made. The Department should be prepared to enter into third-party consents or direct agreements with lenders as part of the financing process.

cover only 50 percent of the covered costs. Given this significant reduction in coverage, the nuclear industry believes the \$250-million contracts should carry a premium of 25-30 percent of the cost of the \$500-million contracts.

⁸ This is because the premium amount or contract “cost” deposited in the Standby Support Program Account will provide only a percentage of the face value of the insurance contract.

D.1. Covered Delays Should Be Clearly Defined and Administered in a Manner That Avoids Protracted Litigation and Further Delay

Section 638(c)(1) provides that the Secretary will pay specified costs under a covered contract if full-power operation is delayed by:

- (A) the failure of the Commission to comply with schedules for review and approval of inspections, tests, analyses, and acceptance criteria established under the combined license or the conduct of preoperational hearings by the Commission for the advanced nuclear facility; or*
- (B) litigation that delays the commencement of full-power operations of the advanced nuclear facility.*

The implementing regulations should provide that each contract will establish agreed-upon schedules for review and approval, with any deviations by the NRC from such schedule as the basis for coverage and for triggering claims under the coverage, unless such delay is the result of an excluded cause. Further, to ensure schedule certainty, all such schedules should be finalized at least 90 days prior to queue effectiveness (*i.e.*, receipt of COL and pouring of safety-related concrete).

As noted in Section I of these comments, the ITAAC are not vague, qualitative, general standards susceptible to varying interpretations. The ITAAC are precise, quantitative criteria that are spelled out in the construction and operating license and incorporated in the COL. They provide unambiguous and unequivocal proof that the plant will operate safely as designed, in accordance with its license. NRC approval should be straightforward and expeditious, and it is not unreasonable to expect NRC to establish a standard timetable for review and approval of the acceptance criteria, and to be held accountable to those timetables.⁹

“Litigation” (as the term is used in Section 638(c)(1)(B)) should be defined to include all federal and state court proceedings as well as administrative hearings, including without limitation any hearing under Part 52.103 of the Commission’s regulations. The agreement should make clear that coverage applies to delays caused by the NRC administrative hearing processes—*e.g.*, pre-operational hearings requested and conducted by NRC in response to the NRC *Federal Register* Notice issued pursuant to 10 CFR 52.103 not less than 180 days prior to initial fuel load.

Implementing regulations should also clarify the meaning of “full-power operation” so that the regulations accomplish the intended statutory purpose—*i.e.*, providing coverage for delay in the ability of a sponsor to complete construction, all required testing, and the commencement of commercial operation. The NRC regulations applicable to Part 50 licenses, which provide for an initial authorization of operations up to 5 percent and then a

⁹ Such a timetable could be incorporated into the quarterly reports to Congress and the Secretary of Energy required by Section 638(f) of the Energy Policy Act.

second authorization for operations exceeding 5 percent, do not provide any useful guide for defining “full-power operations” for purposes of standby support, as suggested in the NOI. There is also a risk that covered delays will occur even after low-power operations or start-up testing procedures (at 5 percent power or less) are completed. In addition, the regulations for combined operating licenses under Part 52 do not currently include a series of authorizations for 5 percent power or below, or greater than 5 percent power, and the industry is opposed to any NRC initiative to include such thresholds in its guidance documents. “Full-power operation” should be defined as the completion and satisfaction of all testing procedures and criteria that must be met at or around 100 percent power, including the implementation of corrective actions if required to satisfy such procedures and criteria.

D.2. Implementing Regulations Must Provide Detailed Procedures for Third-Party Arbitration of Disputes

Because timely payment of covered delays will be critical to the completion of projects and will be an unconditional requirement of lenders and investors, DOE should provide for a claims management process where claims can be agreed upon by DOE, and payments for covered losses can be made on an expedited basis. In addition, alternative dispute resolution (ADR) is appropriate here and, therefore, the implementing regulations should provide for binding third-party arbitration of disputes under the covered contract (rather than protracted administrative adjudication) when claims are denied and the insured asserts coverage should apply. The federal government’s interest and the project sponsor’s interest are best-served by an independent, third-party arbiter to determine cause of delay, to manage resolution of disputes, and to assign responsibility for delay. The implementing regulations must prescribe expedited completion of all such arbitration proceedings to enable prompt payment of claims.

“Fast Track” binding arbitration can be authorized under the terms of a Standby Support contract in accordance with DOE’s authority under the Administrative Dispute Resolution Act of 1996 (5 U.S.C. 571, *et seq.*) and DOE’s Statement of Policy on Alternative Dispute Resolution (ADR) dated September 18, 1995. This policy provides that “[t]he Department supports the flexible use of all ADR processes, including ... arbitration, where appropriate.” Fair and expeditious adjudication of claims under the Standby Support program are critical to the viability of this risk protection, and therefore, the success of the program depends upon the availability of binding arbitration that can resolve disputes in a timely manner.

To streamline the process, the regulations should identify the arbitration rules to be used. NEI suggests the American Arbitration Association’s (AAA) Commercial Arbitration Rules, as supplemented by the AAA’s rules for “Large Complex Commercial Disputes” and “Expedited Procedures,” with a goal to complete dispute resolution within 90 days. To support this schedule, we recommend fast track rules for the selection of arbitrators—*e.g.*, a list of 12 to be provided by AAA, each party to select three simultaneously to be stricken, and AAA to decide upon three arbitrators from those remaining. Discovery should be

limited in time and scope, and hearing time should be limited to a set number of days (*e.g.*, 5 days) with each side having equal time. The insured should have the burden to make a good-faith showing of a covered delay and covered loss, and the insurer should have the burden of proof with respect to any claim of excluded delay or excluded loss. The contract should be governed by the laws of a state with a settled body of insurance law (*e.g.*, the State of Delaware), and the Arbitrators should have the duty to provide a “reasoned decision” with written support provided not less than 15 days after rendering a decision in favor of either party, which decision should be rendered upon conclusion of the hearing.

D.3. Exclusions Should Be Clearly Defined to Provide Certainty

Exclusions from coverage under Section 638(c)(2) and issues such as concurrent delays should be clarified in the implementing regulations and contracts. Certainty in this area is necessary for lenders and investors to determine allocation and pricing of risk. In defining terms such as “normal business risk,” “due diligence” and others that appear in the subsection on exclusions, the Department should, to the extent possible, rely on and apply definitions of these terms that appear in business insurance policies available on commercially reasonable terms and conditions.

E. Covered Costs Should Be Inclusive Rather Than Exclusive

Section 638(d)(1) states that the costs to be paid by the Secretary pursuant to such a contract “are the costs that result from a delay covered by the contract.” Section 638(d)(5) provides that the types of covered costs listed in that subsection are inclusive, rather than exclusive.

Specifically, the statutory language in Section 638(d)(5) states that a Standby Support contract:

“... shall include as covered costs those costs that result from a delay during construction and in gaining approval for fuel loading and full-power operation, including—

a. principal or interest on any debt obligation ...” (Emphasis added.)

The use of the word “including” in the description of covered costs—without any additional qualifying language such as “and limited solely to”—suggests that Congress intended an inclusive and expansive definition of covered costs. The implementing regulations should follow this interpretation and specify that allowable covered costs “include” principal and interest on project debt (as noted explicitly in the statute), but also operating and maintenance costs and other costs associated with delay in commercial operation. Because the costs of a covered delay would certainly include significant costs beyond principal and interest, the implementing regulations and contracts should define the full range of costs covered under the contracts.

Other costs of delay include costs of demobilization and remobilization, idle time costs incurred in respect of equipment and labor, increased general and administrative costs, and escalation costs for the completion of construction. In addition, to the extent that litigation or changes in regulation or government-initiated modifications to the COL result in required redesign, alteration or additions to the project, then the additional costs associated with such redesign or alterations should be covered.

The limit on federal government liability under Section 638 was determined by Congress to be \$500 million for the first two contracts and \$250 million for the next four contracts. Arbitrary sublimits under those caps are neither necessary nor appropriate.

Finally, the regulations should clarify that the Department is authorized to enter into contracts that provide the full amount of coverage (\$500 million in the case of the first two contracts, \$250 million in the case of the next four) only for delay costs covered by the Standby Support Program Account. The Standby Support contracts do not have to include coverage (or provide funding for) delay costs associated with the Standby Support Grant Account.

III.

NUCLEAR INDUSTRY RESPONSES TO QUESTIONS IN THE NOTICE OF INQUIRY

Question: *Subsection (a) of section 638 defines the terms “advanced nuclear facility,” “sponsor,” and “combined license” as follows. “Advanced nuclear facility” is any nuclear facility for which the Commission approves the reactor design after December 31, 1993, provided that the Commission has not approved such design or a substantially similar design of comparable capacity on or before that date. “Sponsor” is any person who has applied for or been granted a combined license. “Combined License” is a combined construction permit and operating license issued by the Commission for an advanced nuclear facility. While the Department believes these terms are clear, it requests comments as to whether the implementation of section 638 would be facilitated by the Department further clarifying, either in regulations or in the standby support contracts themselves, these terms or any other terms set forth in section 638 (such as “the fair market price of power” in subsection (d)(5)(B)). If a commenter believes that it would be more appropriate for certain clarifications and definitions to be provided in regulations instead of the contracts themselves, or vice versa, the commenter should explain why.¹⁰*

Industry Response: A number of terms set forth in Section 638 should be clarified or further defined. These terms include “advanced nuclear facility”, “sponsor” and “fair market price of power.”

The terms “advanced nuclear facility” and “sponsor” should be defined in the regulations instead of the contracts because they address the issue of project eligibility. Greater clarity with respect to project eligibility early in the project development and selection process through regulations would facilitate implementation of Section 638.

With respect to the definition of “advanced nuclear facility”, the implementing regulations should:

1. not preclude consideration of three different new reactor designs;
2. not provide a “no later than” date for design approval;
3. clarify that a reactor design for which a design certification is pending at the time the COL application is submitted by a sponsor is eligible (*i.e.*, should reflect the ability to proceed with design certification and COL on a parallel process); and
4. clarify the meaning of “substantially similar” to specify that no reactor design that obtains its own NRC design certification after December 31, 1993, shall

¹⁰ All questions (in italic type throughout this section) are taken verbatim from DOE’s November 25, 2005, NOI.

be considered “substantially similar” to a design approved on or before such date.

By following the foregoing guidelines, the implementing regulations will create a more competitive, less exclusionary environment that will consider at least two (and not necessarily preclude a third) new reactor designs.

With respect to the definition of “sponsor,” the regulations should require that a sponsor has submitted a COL application that the NRC accepts as sufficient for docketing, rather than an application submitted but later deemed insufficient for review by the NRC. Requiring that a COL application be accepted by the NRC would allocate standby support protection to those sponsors and projects that appear to be the most prepared and likely to achieve commercial operation absent regulatory delay. Also, the acceptance of a COL application indicates that the sponsor has provided significant financial and other information regarding the project that need not be duplicated in the DOE standby support application process.

The definition of the “fair market price of power purchased” should be clarified in the implementing regulations. To provide financing certainty, “fairness” cannot be left to an after-the-fact or subjective determination. The price paid should be presumed fair if reference can be made to a binding bilateral contract or a published market price index, and the government would bear the burden of demonstrating otherwise.

Question: *Subsection (b) of section 638 authorizes the Secretary to enter into standby support contracts with sponsors of advanced nuclear facilities that would provide risk insurance against certain regulatory or legal delays that are not the fault of the sponsors but which have the potential to dramatically increase the cost of bringing new nuclear power plants on line. Subsection (b) directs that sufficient funding to pay the covered costs under these contracts be placed in designated Departmental accounts when the contracts are entered into. Subsection (b) provides that only six reactors can receive benefits under these contracts. In addition, subsection (d) provides for different amounts of covered costs with respect to the initial two reactors that receive their COL and commence construction and the subsequent four reactors.*

Section 638 grants the Secretary considerable discretion as to when, how and with whom to enter into standby support contracts. The Department believes that the objectives of section 638 are best achieved by maximizing the opportunities for sponsors to enter into standby support contracts as early as practical. The Department recognizes, however, that entering into a contract with a sponsor before the sponsor receives a COL and commences construction may raise a number of implementation issues. These issues arise from, among other things, the requirement to have adequate funding in the accounts before entering into a contract, the different treatment of the initial two facilities and the subsequent four facilities, and the disposition of funds received from a sponsor

The Department’s initial view is that these considerations can be addressed best by the Department being willing to enter into binding agreements with sponsors that submit

COL applications to the Commission, at any time on or after such an application is submitted. These agreements between the Department and project sponsors would not themselves be standby support contracts, but would commit the Department to enter into standby support contracts under section 638 with the sponsors of the first six reactors for which a COL is granted and construction commenced. In commenting on this potential approach, consideration should be given as to what provisions might be included in the agreements to deal with issues such as calculating the amount of funding, if any, from the sponsors and taking into account the extent to which appropriated funds are available. The Department requests comments on whether, at the time the Department and the sponsors enter into the binding agreement or at any another specified time, the sponsors should be required to deposit funds in an escrow account to cover all or some of the anticipated funding requirements of the contract. The Department also welcomes comments on whether other options would be more effective in achieving the objectives of section 638, and, if so, what regulatory or contractual provisions would be useful in implementing these options.

Industry Response: Since the availability and coverage scope of the Section 638 contracts are limited, appropriate sponsor eligibility and queue allocation are critical. NEI agrees that it is necessary and appropriate to establish a list of projects eligible for coverage in advance of the effective date of such coverage. The industry agrees that there is merit in the concept of “binding agreements” to provide coverage between the Department of Energy and project sponsors, which would be converted into firm Standby Support contracts when a COL is issued and construction started.

Effectiveness and level of coverage for the contract between the Department of Energy and a project developer cannot be determined until the project receives its COL and commences construction. (At that time, the “insurance fee” necessary to support the coverage—obtained either from the project developer or through appropriations or a combination of the two—must be in place.) Long before COL receipt and start of construction, however, the project developer will be seeking project approval from its board of directors and arranging construction financing. Decisions by corporate boards and lenders will obviously depend on whether or not the project in question will receive one of the six Standby Support contracts. To address this timing issue, the industry believes that the Department of Energy should establish a “pool” of companies eligible for the Standby Support (*i.e.*, those that have docketed COLs), as suggested in the NOI. The “pool” would be converted into a queue and then firmed up as companies reach the trigger points for effectiveness of the Standby Support (receipt of the COL and commencement of construction).

The nuclear industry believes that these preliminary agreements that establish eligibility for coverage should:

1. be binding on DOE without conditions;
2. require that the standby support contract expected to be executed is attached;

3. not be contingent on subsequent appropriations;
4. be subject to specific enforcement.

Since the preliminary agreement simply establishes eligibility for coverage, and does not provide coverage itself, any requirement for fees, or the deposit of sponsor funds in an escrow account, to secure a preliminary agreement of eligibility is unnecessary. Any funding requirements would be adequately addressed by requiring payment of such funds as a condition precedent to issuance of the definitive Standby Support contract. This would address fully the statutory requirement (under the 2005 Energy Policy Act and the Federal Credit Reform Act) that funds be deposited prior to the Secretary entering into a standby support contract. An escrow account mechanism is unnecessarily cumbersome and would increase project costs without significant benefits.

Question: *The Department requests comments on whether to utilize an application process. There are many contract process and implementation issues that may be addressed in an application process. For example, should the Department require a fee to accompany the application, and, if so, how much should the fee be and should it be refundable? Should the application process be used to assist in determining the amount of funding needed prior to entering into a contract? Should the applicant/sponsor be required to submit an analysis showing the proposed "cost" of the standby support contract? Should the application process be open to all sponsors or should there be criteria to exclude certain entities or to select among applicants? What level of detail should the Department institute in any application process? The Department requests comments on the advantages and disadvantages of a detailed application process, including comments on the content and how best to implement such an application process.*

Industry Response: Any application process should be limited to (1) notifying the Department of a project sponsor's intent to seek Standby Support coverage, and its eligibility for such coverage, and (2) providing the Department with the information required by the regulations to enter into a contract. The insurance premium that will be paid by the project sponsor in order to execute the Standby Support contract is sufficient to cover the cost of underwriting. Additional application fees are unnecessary.

The application process should be open to all sponsors that have submitted a COL application that the NRC accepts as sufficient for docketing. Any criteria to exclude certain entities, or select among applicants, beyond those contained in the statute are unacceptable. Sufficient screening criteria exist as a result of the process for preparing and docketing a COL application and the process authorized in Section 638 for entering into a definitive standby support contract (*i.e.*, contracts provided to the sponsors of the first six reactors for which a COL is granted and construction commenced, subject to the statutory requirement limiting contracts to not more than three different designs).

Project sponsors should not be required to submit an analysis showing the proposed “cost” of the standby support contract, and there is no reason to do so, because the insurance premium required for the two \$500-million contracts and the four \$250-million contracts should be based on similar sovereign risk insurance coverage provided by the U.S. government and commercial insurers. That premium should be standard and should not vary from contract to contract (although the \$250-million contracts should obviously carry a significantly lower premium than the \$500-million contracts).

Question: *The Department also requests comments on whether the regulations or the contracts themselves should provide DOE with the right to cancel a contract should a sponsor not proceed diligently to construct a facility that has received a COL and on which construction has commenced. The Department believes that the objective of section 638 is not to simply encourage the licensing of facilities, but to see that they are successfully constructed and brought online. Yet it is possible that, for a variety of potential reasons, a sponsor might be unable or unwilling to proceed with expeditious construction and completion of a licensed facility. Because the Act only allows DOE to enter into standby support contracts “that cover a total of 6 reactors,” should DOE be able to cancel a contract in certain circumstances, thereby potentially “freeing up” one or more of the authorized spots so that DOE could enter into a standby support contract with another sponsor? If so, what are the circumstances that should allow DOE to do so? DOE requests comment on all aspects of this issue.*

Industry Response: Because the availability and coverage scope of Section 638 contracts are limited, DOE should have the right to cancel a contract in the event a project is abandoned or construction is suspended for an extended period (e.g., 180 days) for reasons other than a covered delay or a *force majeure*. Any premium paid for a contract cancelled by DOE for cause would be forfeit. Any appropriated funds obligated with respect to a contract that is cancelled should be made available for another contract. Accordingly, appropriations for the program should be “multi-year” money. Such funds should be available for obligation for an extended period (5 to 10 years) in light of the extended construction period for such projects and to ensure the availability of such funds for replacement contracts in the event of a contract termination.

While contract termination should not occur easily, DOE should have the right to terminate a contract where a project has been abandoned or in the case of an unexcused, extended suspension of construction. This concept would advance the statutory objective (providing coverage to six reactors) by making the unused slot for Standby Support coverage available to a sponsor that is prepared to pursue construction of an advanced nuclear facility. This mechanism should be utilized to allow:

1. a project sponsor that was not eligible for standby support coverage to obtain one of the six contracts, and
2. if the terminated contract was one of the initial two receiving 100 percent coverage under section 638(d)(2), the project sponsor who is next in the queue with the more limited coverage under section 638(d)(3) would be able to advance in the queue to obtain the full 100 percent coverage under (d)(2).

Project lenders should also have the right to step in and complete the project, or transfer the project to an acceptable sponsor that would complete the project, prior to the Department's exercise of any contract termination rights, and without penalty or increase in fee.

Question: *Subsection (b)(2) establishes a funding requirement that must be met before the Secretary can enter into any standby support contract. Specifically, the Department must establish two separate accounts and have a specified amount of funds in the account before entering into a contract. The first account is labeled as a "Standby Support Program Account" ("Program Account"), and the second account is labeled as a "Standby Support Grant Account" ("Grant Account"). Subsection (b)(2)(C) specifies that the Program Account contains funds either appropriated to the Secretary in advance of the contract or a combination of appropriated funds and loan guarantee fees. This funding is required to be in an amount sufficient to cover loan costs. Subsection (b)(2) specifies that the term "loan cost" has the meaning given the term "cost of a loan guarantee" under section 502(5)(C) of the Federal Credit Reform Act of 1990 (2 U.S.C. 661a(5)(C)), which is "the net present value, at the time when the guarantee loan is disbursed," of certain costs. The costs for purposes of subsection (b)(2)(C)(i) are identified by a cross-reference to the costs described in subsection (d)(5)(A) which are the principal or interest on any debt obligation of an advanced nuclear facility owned by a non-Federal entity. Subsection (b)(2)(C)(ii) specifies that the "Grant Account" contains funds either appropriated to the Secretary in advance of the contract, funds paid to the Secretary by the sponsor, or a combination of appropriations and payments. This funding is required to be in an amount sufficient to cover the costs described in subsection (d)(5)(B) which are the incremental difference between (i) the fair market price of power purchased to meet the contractual supply agreements that would have been met by the advanced nuclear facility but for the delay, and (ii) the contractual price of power from the advanced nuclear facility subject to the delay.*

Funding for both the Program Account and the Grant Account may be provided by either or both the federal government and sponsors of advanced nuclear facilities. In this regard, the Department notes that the provision in subsection (d)(4)(B) allowing acceptance of non-federal funds makes those non-federal funds available to the Secretary only to pay covered costs. Because the funds are made available to the Secretary "for payment of the covered costs" and not for any other purpose, the Secretary is only able to use the funds for that purpose (see 31 U.S.C. 1301(a)). If funds are not expended on covered costs, the Department anticipates that at the end of the program the government would move to close the account under 31 U.S.C. 1555 and deposit the funds into the general Treasury (see 31 U.S.C. 1555,

31 U.S.C. 3302(b)). The Department requests comment as to what extent, if any, these provisions will affect participation in the program. The Department also requests comment on what is the appropriate mix between government appropriations, sponsor payments, and a combination of both.

Industry Response: The industry would not expect insurance premiums along the lines described in Section II.B of these comments to be returned to the insured if no claims are filed.

Participation in, and effectiveness of, the risk insurance program would be impacted if the estimated cost of the program and the required amount of non-federal funds is set unrealistically high, however.

The key to effectiveness of the Standby Support Program Account (which covers debt service and other unspecified costs) is the “pricing” or “scoring” of the insurance contracts, and the appropriations (and/or sponsor funding) necessary to allow the Secretary of Energy to execute contracts for coverage. If the cost is deemed too high, project sponsors will not use the Standby Support coverage, and the implementing regulations will not have satisfied the statutory intent of Section 638.

As discussed in Section II.B of these comments, the nuclear industry recommends that the Standby Support Program Account coverage be priced similarly to other insurance against sovereign risks provided by other federal government agencies (*e.g.*, the Overseas Private Investment Corp. [OPIC]) and other public and private insurers.

Given this model, which is widely accepted and used throughout the federal government and the private sector to cover political risks of the kind covered by Section 638, the industry sees no justification for additional funding to support a contract under the Standby Support Program Account. If the Department determines that the “cost” of a contract under the Standby Support Program account is higher than the insurance premium that applies in similar circumstances (*e.g.*, sovereign risk insurance provided by institutions like the Overseas Private Investment Corporation), however, then the Department should fund that amount through appropriations. Any funding necessary to support an insurance contract under the Standby Support Program Account beyond the insurance premium should not be the project sponsor’s responsibility.

In contrast, the power purchase protection is funded through the Standby Support Grant Account, which is not subject to Federal Credit Reform Act scoring protocols. Section 638 (b)(2)(C)(ii) appears to require that the total amount of the incremental cost of power (cost of coverage) be deposited into the Standby Support Grant

Account. Similarly, section 638(d)(4)(A) appears to condition payment of the covered costs relating to incremental cost of power on sufficiency of funds.

Because of the significant difference in scoring of the power purchase protection, the nuclear industry would not be interested in availing itself of the power purchase coverage unless the Standby Support Grant Account was funded through appropriations. Any other arrangement would require lenders and/or project sponsors to assume the risk of adequacy of the funds in the account (which would depend on events from unrelated contracts).

The regulations should clarify that the Department is authorized to enter into contracts that provide the full amount of coverage (\$500 million in the case of the first two contracts, \$250 million in the case of the next four) only for delay costs covered by the Standby Support Program Account. The Standby Support contracts do not have to include coverage (or provide funding for) delay costs covered by the Standby Support Grant Account.

Question: *Congress specified certain details of the methodology for calculating the funding that must be in the two accounts prior to entering into a contract. However, the Department has considerable discretion in the implementation of that methodology. The Department must decide whether to calculate the funding on a generic basis that would result in the same funding for each facility or on a facility specific basis that would result in different funding for each facility. The Department also must decide whether to differentiate between the initial two facilities and the subsequent four facilities. The Department requests comments on how it should exercise this discretion and, in particular, what factors it should consider in determining both the overall amount of funding and the portion, if any, required from the sponsors.*

Industry Response: As noted in Section II.B, the key to effectiveness of the Standby Support Program Account (which covers debt service and other unspecified costs) is the “pricing” of the insurance contracts, the budget “scoring” of those contracts pursuant to Federal Credit Reform Act protocols, and the appropriations (and/or sponsor funding) necessary to allow the Secretary of Energy to execute contracts for coverage. If the insurance premium is set unreasonably or unrealistically high, project sponsors will not use the Standby Support coverage, and the implementing regulations will not have satisfied the statutory intent of Section 638.

The nuclear industry believes the Standby Support coverage should be priced similarly to other insurance against sovereign risks provided by other federal government agencies (e.g., the Overseas Private Investment Corp. [OPIC]) and other public and private insurers. OPIC risk insurance against so-called “creeping expropriation” carries an annual premium of 40-70 basis points of the face value of the coverage. Similar political risk insurance available from the commercial insurance market typically carries a slightly higher annual premium, in the range

of 100 basis points of the face value of the coverage. Using 100 basis points as an example, a \$500-million Standby Support policy would cost the project sponsor \$5 million per year. Assuming a five-year construction period during which the coverage would be in force, the cost of a \$500-million Standby Support contract would, therefore, be \$25 million.

The cost of the second four \$250-million Standby Support contracts should, of course, be significantly less than the nominal \$25 million premium established above for the \$500-million coverage. The \$250-million coverage available for the second, third, fourth and fifth reactors is significantly less valuable than the \$500-million coverage available for the first two reactors covered, because the third, fourth, fifth and sixth contracts require a six-month period before delay costs are covered, and cover only 50 percent of the covered costs. Given this significant reduction in coverage, the nuclear industry believes the \$250-million contracts should carry a premium of, at most, 25-30 percent of the cost of the \$500-million contracts.

The Department should work with OMB, other federal agencies that provide political risk insurance, the nuclear industry and other interested parties to develop a standardized pricing approach for each contract along the lines suggested above.

Question: *In a related matter, the Department requests comments on whether, if a sponsor participates in the section 638 risk insurance program, and any loan guarantee program for which the sponsor may be eligible pursuant to Title XVII of the Act, and/or the production tax credits for advanced nuclear facilities in section 1306 of the Act, there should be any adjustment in the amount paid to the Department by the sponsor to participate in more than one program or in the amounts that a sponsor can receive under more than one program.*

Industry Response: There is nothing in Section 638, Title XVII or Section 1306 of the Energy Policy Act to suggest that Congress intended any limitation on any of these programs if project sponsors avail themselves of one, two or all three of these programs. The Department has no statutory basis, authority or discretion to impose any such limitation or create any linkage.

Participation in the different programs established under the Energy Policy Act of 2005 should not limit a project sponsor's eligibility for any of these programs, or the amounts that a sponsor can receive under them. The objective of these programs is to facilitate and encourage the construction and full power operation of new advanced nuclear facilities. The programs are complementary, not exclusive.

The Standby Support is materially different from the investment stimulus provided by the Title XVII loan guarantee authority and the Section 1306 production tax credits. The nuclear energy industry receives no direct financial benefit from the Section 638 Standby Support. Rather, this political risk insurance is designed to protect private companies from a regulatory miscarriage over which they have no control. Section 638 serves a broad public policy objective: Absent this investment protection for the first few nuclear plants built under an untested licensing process, companies would not proceed with the nuclear power plant construction that is clearly in the national interest.

In the event that a project obtains Standby Support coverage under Section 638 and a loan guarantee under Title XVII, the standby support coverage would apply under some circumstances to make payments for debt service and other delay costs so that there would be no need to resort to the loan guarantee program. Thus, the cost of the loan guarantee should be adjusted downward to reflect the reduced risk of default on the underlying debt obligation as a result of the Standby Support. Adjusting the subsidy cost of the loan guarantee in this circumstance would avoid double-counting the risk of regulatory or litigation delay when such risk is already covered under a section 638 Standby Support contract.

Question: *Subsection (c) specifies situations in which the Secretary will pay the “covered costs” and situations in which the Secretary is precluded from paying such costs. Among the situations set forth in subsection (c)(1) in which the Secretary will pay such costs are (A) “the failure of the Commission to comply with schedules for review and approval of inspections, tests, analyses, and acceptance criteria established under the combined license or the conduct of preoperational hearings by the Commission...” or (B) “litigation that delays the commencement of full-power operations...” The terms of subsection (c)(1)(A) are closely related to the part 52 COL licensing process. The COL issued to the licensee specifies the inspections, tests, analyses and acceptance criteria (which are known as ITAACs) with which the licensee must comply. The Commission requires verification that the licensee has completed the required inspections, tests, and analyses, and that the acceptance criteria have been met before the reactor can operate. However, the Commission’s regulations do not set any schedules for completing ITAAC review. Rather, under the COL, the licensee sets the schedule for ITAACs and may change the schedule as circumstances warrant. Although the Commission may set informal, internal schedules for auditing the licensee’s performance of its ITAAC and will provide public notice upon completion of its review, there is no regulatory requirement for the Commission’s conduct or timing of such auditing.*

The part 52 regulations provide that the Commission give notice of intended operation not less than 180-days prior to the scheduled date for initial fuel load. During this time, the Commission intends to complete its review of the ITAACs and make a final determination whether the acceptance criteria have been met and reactor operations can begin. Given the complexity of the ITAAC review process, a back-loading of submissions to the Commission toward the end of the 180-day period might cause the Commission to be unable to complete its audit process prior to the fuel loading date. Thus, while a delay in

operation might initially appear to be attributable to delays by the Commission, in fact the delay might be more attributable to a sponsor's relatively late completion and submittal of the ITAACs. The Department notes that these issues likely could be satisfactorily addressed through Commission regulations, audit procedures or guidance as they currently exist, or modified as appropriate and necessary. If no changes were made to the Commission's current regulations or procedures, however, the Department requests comments on how to address this situation either through the Department's section 638 regulations or through the standby support contracts.

Industry Response: The industry does not accept the underlying premises behind this question. As discussed in Section I of these comments, the industry does not believe that "complexity" is the defining characteristic of "the ITAAC review process."

The ITAAC are not vague, qualitative, general standards susceptible to varying interpretations. The ITAAC are precise, quantitative and unambiguous indicators that provide unambiguous and unequivocal proof that the plant will operate safely as designed, in accordance with its license. NRC approval can, and should, be straightforward and expeditious.

The industry also does not believe that there will be any "back-loading of [ITAAC approval] submissions to the Commission." By contrast, licensees will be motivated to complete ITAAC as quickly as possible during construction, and seek NRC approval of those ITAAC promptly.

It is inevitable that there will be ITAAC that will not (and cannot) be completed 180 days before scheduled fuel load and will, therefore, be completed in the period between the 180-day notice in the *Federal Register* and fuel load. These final ITAAC represent only a small percentage of the total ITAAC, however, and should not represent a potential source of delay in fuel load, low-power testing and commercial operation, as long as NRC manages its ITAAC review and approval process expeditiously.

The Department's concern—that "a delay in operation might initially appear to be attributable to delays by the Commission [when] in fact the delay might be more attributable to a sponsor's relatively late completion and submittal of the ITAACs"—can be managed through a claims management process and arbitration of disputed claims, as suggested in Section II.D.2 of these comments.

Question: *The Department also believes it is possible that even if there is an ITAAC-related delay attributable to Commission regulatory delays, such a delay in the regulatory schedule might not be the cause of any delay in the full power operation of a nuclear facility that does in fact occur. For example, other factors (such as construction or engineering delays) might contribute to or be the primary cause of the delay. The Department requests comment on how best to establish whether the Commission failed to comply with the ITAAC*

schedules and, if so, whether such delay by the Commission is in fact the cause of a delay in full power operation. Specifically, are there any objective, unambiguous triggers that the Department could include in a regulation or in individual contracts to better ascertain whether a delay should be attributable to the Commission and thus covered by the contracts.

Industry Response: Because timely payment of covered delays will be critical to the completion of the projects and will be an unconditional requirement of lenders and investors, DOE should provide for a claims management process where claims can be agreed upon by DOE and payments for covered losses can be made on an expedited basis. In addition, the implementing regulations should provide for binding third-party arbitration of disputes under the covered contract (rather than protracted administrative adjudication) when claims are denied and the insured asserts coverage should apply. The federal government's interest and the project sponsor's interest are best-served by an independent, third-party arbiter to determine cause of delay, to manage resolution of disputes, and to assign responsibility for delay. Further details regarding claims management and binding arbitration to resolve disputes are discussed in Section II.D.2.

Question: *In addition, some delays may be caused by other governmental entities, including the Federal Emergency Management Agency (FEMA) and state and local governments. Before full power reactor operations may commence, the Commission must determine that the off-site emergency plans are adequate and in place. Specifically, under 10 CFR part 50, subsection 50.47(a) "Emergency Plans," (which is also applicable to facilities licensed under part 52), the Commission will base its emergency planning findings on review of a related FEMA determination whether "State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented." Similarly, under section 50.47(c), state and local governments may be responsible for some delays, if they decide not to participate in the emergency planning process with FEMA. The Department requests comment as to how best to treat delays that are caused by other governmental agencies and thus may be beyond the control of the Commission.*

Industry Response: Such delays should be covered. The issue is not which agency controls the delay, but whether delay resulted from the regulatory process or litigation resulting from the government's regulatory processes, and not resulting from factors that are within the control of the project sponsor.

Question: *Subsection (c)(1)(A) also refers to delays in full power operation of advanced nuclear facilities caused by "the conduct of preoperational hearings by the Commission..." This section is susceptible of two different interpretations; it either can be interpreted to allow coverage only for delays associated with preoperational hearings where the Commission has failed to comply with applicable schedules, or it can be interpreted to allow coverage for delays associated with any preoperational hearings, regardless of who requested or caused the hearing and regardless of whether there was a "failure" of any kind by the Commission.*

After issuance of the COL, there is only one opportunity for a public hearing in part 52 (i.e., when a sponsor is ready to load fuel, it must notify the Commission and the Commission must, at least 180 days prior to the load fuel date, issue a public notice and opportunity for hearing on the proposed operation. See section 52.103.) The hearing may be held at the discretion of the Commission based on the showing by an outside entity that the acceptance criteria have not been met. There is no preset schedule for the conduct of the pre-operational hearing if it is granted, and the hearing may be formal or informal. If formal, the timing related to and the conclusion of the process is very uncertain. Given the undefined and untested process for a COL, it is not clear which party would be at fault for a delay caused by a pre-operational hearing, or even if "fault" is a relevant concept in holding another hearing to ascertain if the public's overriding need for safety is satisfied.

As a result, the Department is inclined to interpret subsection (c)(1)(A) as meaning that a "covered delay" includes any delay caused by the conduct of preoperational hearings by the Commission. The Department requests comments on this interpretation, how best to implement it, any alternatives, and all other aspects of subsection (c)(1)(A). In particular, given the potential interpretation that some portion of a delay caused by a preoperational hearing might not be considered a "covered" delay, the Department requests comments on whether a regulatory delay should only be considered a "covered delay" after a certain time period, as specified by contract or regulation. If so, what time period would be appropriate?

Industry Response: NEI agrees with the Department's interpretation of Section 638(c)(1)(A) that "a 'covered delay' includes any delay caused by the conduct of preoperational hearings by the Commission." This reflects the plain language and intent of the statute.

Question: *Subsection (c)(1)(B) refers to "litigation that delays the commencement of full-power operations..." Black's Law Dictionary broadly defines the term "litigation" as "The process of carrying on a lawsuit," and the term "lawsuit" is defined as: "any proceeding by a party or parties in a court of law." In the context of the COL process, there may be litigation both before an administrative board to adjudicate claims in the Commission licensing process and in federal court. The Act is silent as to what type of litigation section 638 refers. Because subsection (c)(1)(A) already refers to certain Commission proceedings that may delay full power operation, the Department is inclined to interpret the term "litigation" in subsection (c)(1)(B) as meaning only litigation in state, federal, or tribal courts, including appeals of Commission licensing decisions, and excluding administrative litigation that occurs at the Commission as part of the COL process. The Department requests comment as to what type of litigation delays should be covered by the Program.*

Industry Response: NEI does not agree with the narrow interpretation of the term "litigation" articulated in the NOI. The term "litigation" should be defined broadly. Covered delays from litigation should include any litigation that results in a delay in full-power operation after the effectiveness of the Standby Support contract, regardless of whether such litigation is a state or federal judicial or administrative proceeding.

Question: *Although the term “full power operation” is not defined in section 638 or 10 CFR part 52, the Commission generally considers this to be operation at five percent or greater. (See 10 CFR 2.340(g)(1); and Statement of Policy on Issuance of Uncontested Fuel Loading and Lower Power Testing Operating Licenses, 46 FR 47906, September 30, 1981) The Department intends to follow the Commission practice but nevertheless requests comments on how to incorporate this interpretation of “full power operation” into the regulations carrying out section 638.*

Industry Response: NEI does not agree with the NOI interpretation that full-power operation constitutes operation at any power level above five percent. On its face, a plain language interpretation of “full power operation” means operation at or around 100 percent power on a sustained basis. Implementing regulations should clarify the meaning of “full power operation” so that the regulations accomplish the intended statutory purpose — *i.e.*, providing coverage for delay in the ability of a sponsor to complete construction, all required testing, and the commencement of commercial operation. The NRC regulations applicable to Part 50 licenses, which provide for an initial authorization of operations up to 5 percent and then a second authorization for operations exceeding 5 percent, do not provide any useful guide for defining “full power operation” for purposes of standby support, as suggested in the NOI. There is also a risk that covered delays will occur even after low-power operations or start-up testing procedures (at 5 percent power or less) are completed. In addition, the regulations for combined operating licenses under Part 52 do not currently include a series of authorizations for 5 percent power or below, or greater than 5 percent power, and the industry is opposed to any NRC initiative to include such thresholds in its guidance documents. In any event, “full power operation” should be defined as the completion and satisfaction of all testing procedures and criteria that must be met at or around 100 percent power, including the implementation of corrective actions if required to satisfy such procedures and criteria.

Question: *Subsection (c)(2) expressly precludes the Secretary from paying costs resulting from three general areas: “(A) the failure of the sponsor to take any action required by law or regulation; (B) events within the control of the sponsor; or (C) normal business risks.” The Department requests comment on how best to interpret and apply this subsection, including examples of each category of exclusion. The Department particularly invites the public to respond to the following questions. What areas of laws and regulations are likely to be involved? What events should be considered within the control of the sponsor and what events should be considered beyond its control? What should be considered a normal business risk, and thus not coverable under the Program? How should these exclusions be implemented with respect to the expressly covered delay caused by the “conduct of preoperational hearings”? In other words, for example, if a sponsor’s alleged failure to take an action required by law is the reason that the Commission holds a preoperational hearing, is the delay caused by that hearing a covered delay or an excluded delay? For each of these questions, the Department requests that commenters provide examples.*

Industry Response: The nuclear industry does not expect to be protected against delays and losses caused by factors that fall within its control (e.g., late delivery of equipment).

Once the sponsor has demonstrated that a delay in full-power operation was a covered delay, however, then the Department should have the burden of showing that such delay or a portion of such delay should be excluded from coverage on the basis of one of these exclusions. This is consistent with prevailing insurance law, which traditionally places the burden of proof regarding exclusions from insurance coverage on the insurer. Because it is impossible to predict every conceivable circumstance under which a delay might occur, the implementing regulations should provide for a claims management process where claims can be agreed upon by DOE and payments for covered losses can be made on an expedited basis. In addition, the implementing regulations should provide for binding third-party arbitration of disputes under the covered contract when claims are denied and the insured asserts coverage should apply. The federal government's interest and the project sponsor's interest are best-served by an independent, third-party arbiter to determine cause of delay, to manage resolution of disputes, and to assign responsibility for delay.

Question: *Subsection (e) specifies that any standby support contract requires “the sponsor to use due diligence to shorten, and to end, the delay covered by the contract.” Black’s Law Dictionary defines “diligence as (1) a continual effort to accomplish something and (2) the attention and care required from a person in a given situation. In turn, Black’s Law Dictionary defines “due diligence” as “[t]he diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or a discharge of an obligation.” The Department requests comments on how this term should be used in the context of a standby support contract, whether it should be further defined in the regulations or contracts, specific examples of situations that commenters believe should or should not come within the term, and how the Department should determine due diligence by the sponsor.*

Industry Response: In defining terms such as “due diligence” and others that appear in the subsection on exclusions, the Department should, to the extent possible, rely on and apply definitions of these terms that appear in business insurance policies available on commercially reasonable terms and conditions. Once a project sponsor has asserted that a delay in full-power operations was a covered delay, then the Department should have the burden of showing that the sponsor failed to use commercially reasonable efforts to shorten and end the covered delay.

Question: *Subsection (d) provides for the coverage of costs that result from a delay during construction and in gaining approval for full power operation, specifically (A) principal and interest and (B) incremental cost of purchasing power to meet contractual agreements. The Department requests comments on how these costs should be documented, especially the*

extent to which they are used in calculating the funding needed prior to entering into a contract.

Industry Response: Project sponsors should be prepared and required to provide documentation of covered costs when filing a claim, as in any claims management process under any insurance program. These covered costs (debt service, O&M costs and other costs) are easily documented with financing agreements and covenants and corporate financial records. DOE should consider providing for a pre-defined “weekly indemnity” for debt service and other costs to be established when the Standby Support Agreement is implemented. The sponsor could simply provide information in a worksheet to justify the amount of weekly coverage requested for debt service and other costs, and this pre-established indemnity amount would be paid out as covered costs for any period of covered delay. This would avoid potential disputes over the amount of “covered costs” and simplify the claims management process. (Such an approach would be similar to the weekly indemnity offered by Nuclear Electric Insurance Limited (NEIL) under its NEIL I Accidental Outage Policy or business interruption-type insurance, which provides coverage for costs that would be incurred by a plant owner in the event of a covered nuclear plant outage during a plant’s normal operating life.)

For the project sponsor, potential covered costs (and any documentation associated therewith) have no bearing on the “funding needed prior to entering into a contract.” As noted previously, the cost of coverage under the Standby Support Program Account should be priced according to the well-established federal government and commercial protocols that apply to risk insurance.

Question: *[W]hile the Department anticipates only covering those costs specifically described in subsection (d)(5)(i) and (ii), it notes that subsection (d)(5) states that the covered costs shall be those that result from certain delays “including” the costs specifically described in subsection (d)(5)(i) and (ii). As a result, it might be possible to interpret subsection (d)(5) as authorizing the Department to provide coverage for costs in addition to those specifically described in subsections (d)(5)(i) and (ii). The Department requests comment on whether those are the only costs that should be covered under the contracts and whether the Grant Account and the Program Account are restricted to covering a particular type of cost (i.e., the cost on which funding is based).*

Industry Response: Section 638(d)(1) states that the costs to be paid by the Secretary pursuant to such a contract “are the costs that result from a delay covered by the contract.” Moreover, Section 638(d)(5) provides that the types of covered costs listed in that subsection are inclusive, rather than exclusive. Because the costs of a covered delay would include significant costs beyond principal and interest and the incremental cost of replacement power as listed in (d)(5) (A) and (B), the implementing regulations and contracts should include the full range of costs covered under the contracts.

The use of the word “including” in the description of covered costs—without any additional qualifying language such as “and limited solely to”—suggests that Congress intended an inclusive and expansive definition of covered costs. The implementing regulations should follow this interpretation and specify that allowable covered costs “include” principal and interest on project debt (as noted explicitly in the statute), as well as operating and maintenance costs and other costs associated with delay in commercial operation. Other costs of delay include costs of demobilization and remobilization, idle time costs incurred in respect of equipment and labor, increased general and administrative costs, and escalation costs for the completion of construction. In addition, to the extent that litigation or changes in regulation or government initiated modifications to the COL result in required redesign, alteration, additions or improvements to the project, then the additional costs associated with such redesign or alterations should be covered.

Question: *Subsection (d) distinguishes between the “Initial Two Reactors” that receive combined licenses and on which construction is commenced and the “Subsequent Four Reactors.” With respect to each of the Initial Two Reactors, the Secretary is required to pay 100 percent of the covered costs of delay, but not more than \$500 million per contract. With respect to the Subsequent Four Reactors, the Secretary is required to pay “50 percent of the covered costs of delay that occur after the initial 180-day period of covered delay, but not more than \$250 million per contract. The Department requests comment on the following issues: if there are two reactors being constructed by one sponsor at one location/facility, should there be two contracts in order for the sponsor to receive up to \$500 million in coverage per reactor? Should a sponsor be precluded from entering into a contract that includes more than one reactor?*

Industry Response: There should be a separate contract for each reactor covered regardless of whether such reactor is at the same location of another covered reactor.

Question: *[T]he Department requests comment about the term “commencement of construction” given that neither part 52 nor section 638 defines this term. The commencement of construction of a facility may be defined in several ways, including activities such as the planning and design of a reactor facility, a firm purchase order for a reactor facility, or preparation of a site in anticipation of facility construction. On the other hand, under part 52, the Commission will issue a COL only upon finding that applicable regulatory requirements have been met, and that “there is reasonable assurance that the facility will be constructed and operated in conformity with the license, the provisions of the Atomic Energy Act, and the Commission’s regulations.” 10 CFR part 52.97. The Department believes it is reasonable to interpret “commencement of construction” in a manner consistent with Commission practice and requests comments on what would be the elements of such an interpretation.*

Industry Response: The statute authorizes the Secretary of Energy to provide coverage to a project when it (1) receives a combined construction and operating license (COL) and (2) commences construction. The industry believes it is essential to define “commencement of construction” in a clear and unambiguous way, so that coverage is provided to those projects that (1) have made an irrevocable decision to proceed with construction, and (2) will most need the coverage (because they will be the first ones to navigate the new licensing process). For this reason, the industry believes that “commencement of construction” should be defined as pouring of safety-related concrete. Coupled with receipt of the COL, pouring of safety-related concrete would represent a firm commitment to plant construction. Given the degree of early site preparation, organization and commitment that sponsors would undertake to reach the point at which they pour safety-related concrete, this approach would further the intent of the legislation by ensuring that only “real” projects with a high likelihood of achieving commercial operation receive one of the six queue positions.

Question: *Just as with any commercial insurance contract, there may be potential areas in which a sponsor may disagree with the Department as to an interpretation of a section 638 risk insurance contract provision. The Act does not require any particular dispute resolution mechanism or procedure, and therefore the Department requests comment on how disputes between sponsors and the Department should be resolved, and what dispute resolution provisions should be included in the applicable regulations or contracts.*

The Department notes that an important consideration is to make the standby support regulations that implement section 638 workable, so that they can be readily administered in an efficient and effective manner. Specifically, the regulations may need to include a mechanism to resolve factual and legal disputes as to whether a delay is covered or excluded as well as which party is at fault for a particular delay or event. Other Federal agencies that provide financial assistance have established oversight offices to monitor the projects they fund. For instance, the Department of Transportation’s Transportation Infrastructure Finance and Innovation Act (TIFIA) program, which provides grants for surface transportation projects, has established a TIFIA Joint Program Office to coordinate and manage the implementation of the TIFIA credit program. (See “TIFIA Project Oversight and Credit Monitoring Guidance” (<http://tifia.fhwa.dot.gov/oversight.htm>)) Similarly, the Overseas Private Investment Corporation (OPIC), which provides political risk insurance to U.S. businesses that invest overseas, has established its Office of Accountability to monitor OPIC supported projects. (see <http://www.opic.gov>) Although these programs cover or potentially cover far more entities and projects than the finite number of projects that may be covered by the Standby Support Program, they may provide guidance as to how the Department should resolve disputes.

Industry Response: Because timely payment of covered delays will be critical to the completion of the projects and will be an unconditional requirement of lenders and investors, DOE should provide for a claims management process where claims can be agreed upon by DOE and payments for covered losses can be made on an expedited basis. In addition, the implementing regulations should provide for

binding third-party arbitration of disputes under the covered contract (rather than protracted administrative adjudication) when claims are denied and the insured asserts coverage should apply. The federal government's interest and the project sponsor's interest are best-served by an independent, third-party arbiter to determine cause of delay, to manage resolution of disputes, and to assign responsibility for delay. The implementing regulations must prescribe expedited completion of all such arbitration proceedings, to enable prompt payment of claims.

As discussed in Section II.D.2 of these comments, the regulations should identify the arbitration rules to be used. NEI suggests the American Arbitration Association's (AAA) Commercial Arbitration Rules, as supplemented by the AAA's rules for "Large Complex Commercial Disputes" and "Expedited Procedures," with a goal to complete dispute resolution within 90 days.

Given the relatively narrow scope of Section 638 insurance coverage (*i.e.*, limited to six reactors), the nuclear industry sees no need for a permanent staff office at DOE to administer this program, similar to the offices that oversee the TIFIA program at the Department of Transportation and the risk insurance programs at OPIC. The Department may wish to consider establishing a temporary Risk Insurance Oversight Office within the centralized program office that will be likely be required to administer the loan guarantee authority provided by Title XVII of the 2005 Energy Policy Act.

Question: *Subsection (f) requires the Commission to report to the Secretary and Congress on a quarterly basis regarding the licensing status of advanced nuclear facilities covered by a standby support contract. Apart from the Commission's statutory reports, the Department requests comments on the need to require any other reporting by the sponsor or others to the Department to assist the Department in its monitoring responsibilities, including the content, timing and impact of such reporting. Similarly, the Department requests comment on any other reporting or monitoring activities it should engage in to fulfill its responsibilities under the contract.*

Industry Response: NEI sees no need for any reporting by the project sponsor to the Department of Energy, or any additional reporting to the Nuclear Regulatory Commission beyond that already required under the terms of the construction and operating license. As the insurer, the Department of Energy may wish to protect its interests by real-time monitoring and auditing of the Nuclear Regulatory Commission's approval of ITAAC (to ensure that ITAAC approval is managed efficiently and expeditiously).